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Supreme Court of the United States

October Term, 1952
No. 576

UNITED STATES OF AMERICA, ex rel.
NEREO DOLENZ,

Petitioner,

against

EDWARD J. SHAUGHNESSY, District Director, New York, Immigration and Naturalization Service,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Respondent.

PETITION FOR WRIT OF CERTIORARI

Proceedings Below

This is a petition for review on Writ of Certiorari of a decision of the United States Court of Appeals for the Second Circuit made on the 5th day of December, 1952.

The petitioner entered the United States on October 21, 1949, at Port Everglades, Florida, as a member of the crew of the Yugoslavian vessel "Hvratska". On February 28, 1951, the petitioner was arrested by an officer of the Immigration Service on a warrant charging that he was subject to deportation as an immigration not in possession of a valid immigration visa, as required by law. He has been detained ever since.

On April 5, 1951, petitioner was given a hearing before a Hearing Officer on the question of his deportability. In the course of that hearing, the appellant voluntarily revealed that at the age of sixteen, he had become a member of the Communist Party in Yugoslavia. An additional charge was lodged against the alien: that he was subject to deportation on the ground that he was a member of

the Communist Party of Yugoslavia. The Hearing Officer decided that the alien was deportable. The alien filed exceptions to the decision of the Hearing Officer and the record was forwarded to the Commissioner of Immigration and Naturalization for review. The Commissioner sustained the decision of the Hearing Officer and the alien was ordered deported on the grounds charged. The petitioner appealed to the Board of Immigration Appeals and on July 11, 1951, the Board of Immigration Appeals dismissed the said appeal.

All proceedings in the court of original jurisdiction were instituted in the United States District Court for the Southern District of New York.

On October 23, 1951, after eight months of detention, the relator sued out a writ of habeas corpus for the purpose of seeking his liberty on bond. The writ was dismissed by order of Judge Irving R. Kaufman, District Court Judge, on November 9, 1951.

It is to be noted that up to this point in the proceedings, petitioner was not represented by counsel.

The petitioner learned in December that he was about to be deported to Yugoslavia.

On December 18, 1951, the relator sued out, through his present attorneys, another writ of habeas corpus. It was alleged that the proposed deportation of the relator to Yugoslavia was in violation of the Eighth Amendment of the Constitution, in that it inflicted upon relator cruel and inhuman punishment, and on the further ground that the said deportation would be violative of 8 U. S. C. 156, in that the alien would be subject to physical persecution if deported to Yugoslavia. By stipulation between the attorneys for the Government and the attorneys for the relator, this writ was withdrawn and the deportation of relator was stayed to afford him the opportunity to make application for relief from deportation to Yugoslavia upon

the grounds that such deportation would subject him to physical persecution. This application was made.

On February 21, 1952, the relator was given the opportunity to present evidence in support of his claim that he would be physically persecuted before an investigations officer of the Immigration Department. At that time, the relator and one witness for the relator testified. A deposition of a second witness for the relator was submitted. No witnesses were called by the Government. The Government failed to adduce any evidence.

On the record made at this purported hearing, the investigation officer prepared an "Investigator's Report" in which it was recommended that the Attorney General make a finding that the alien would not be subject to physical persecution in Yugoslavia. This was done without the knowledge of or notice to the alien. On May 21, 1952, Argyle R. Mackay, Commissioner of Immigration, as delegate of the Attorney General, made an order. He stated: "I do not find that if this alien is deported to Yugoslavia, he would be subjected to physical persecution."

The right to appeal from this order to the Board of Immigration Appeals was demanded and the Commissioner refused to allow said administrative appeal.

On June 9, 1952, the instant writ of habeas corpus, which is the subject matter of this controversy, was sued out by relator's attorneys. On July 23, 1952, Honorable David N. Edelstein, District Judge, dismissed the writ but stayed the deportation of the relator pending an application to the Court of Appeals for a stay of deportation pending appeal. Petitioner appealed to the Court of Appeals. An administrative stay was granted pending the decision of the Court of Appeals on such application. Said Court, on October 7, 1952, granted a stay of deportation pending appeal.

The appeal was argued before the Court of Appeals on November 13, 1952, and affirmed by a divided Bench on December 5, 1952. The prevailing opinion was written by Honorable Harrie B. Chase, Circuit Judge, with Honorable August N. Hand, Circuit Judge, concurring. Hon. Charles E. Clark, dissented, in a written opinion.

Statement of the Matter Involved

8 U. S. C. 156 subd. (a) in part provides:

> "No alien shall be deported under any provisions of this chapter to any country in which the Attorney General shall find such alien would be subject to physical persecution."

The questions presented by the case are whether or not the petitioner, granted a purported hearing for the purpose of determining if petitioner would be physically persecuted if deported to Yugoslavia in accordance with the foregoing law, was accorded constitutional due process and whether, in view of all of the circumstances, the Attorney General's decision "that no finding that the appellant would be physically persecuted should be made" (See prevailing opinion of Chase, C. J. in the Court below), was capricious and arbitrary.

Assuming that the Administrative Procedure Act does not apply to Immigration hearings, nevertheless, petitioner was denied a hearing on this question of physical persecution as provided by the rules and regulations of the Immigration and Naturalization service (8 C. F. R. 151 et seq.). Although petitioner was allowed to submit his proofs, a hearing officer did not preside. Instead, the testimony was heard by an investigator of the Service. Thus findings of fact and conclusions of law were not made, which if adverse, would allow the filing of exceptions and an appeal to the Board of Immigration Appeals

as provided by the regulations. It should be noted that the alien's proofs stand uncontradicted on the record.

This investigator, following this purported hearing, submitted a report to the Commissioner of Immigration. Petitioner was not notified of the contents or nature of this report and did not learn of its existence until after the writ here was obtained. Thereafter the Commissioner of Immigration issued an order, as follows:

> "Pursuant to the requirements of Section 20 of the Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, Public Law 831, 81st Congress, after review of the facts in this case, I do not find that if this alien is deported to Yugoslavia he would be subjected to physical persecution."

Upon the order and nothing more the fate of petitioner rests. Negative in form, it violates every tenet of administrative procedure. No findings of fact or law were made, neither were any conclusions of fact or law made. To this day, no reason has been advanced by the Commissioner for the decision which he rendered.

Yet District Judge Edelstein in the lower court and two judges in the Court of Appeals (Chase and Augustus Hand) are of the opinion that the Attorney General's procedure used in dispatching the young man's life and fate to the totalitarian hands of Tito's Yugoslavia is proper and correct and that the act of the Attorney General in deporting this youth to Yugoslavia is not capricious and arbitrary.

Contrary to these judicial utterances, is the expression of Circuit Judge Clark, whose dissenting opinion appears in the appendix. We agree with his conclusion. We also agree with his reasoning but are of the opinion that additional basic grounds lie for the reversal of the order of the Court below. These will be set forth in our brief.

These questions were passed upon for the first time by an appellate court in this case. In three other reported district court cases, the decisions of the Attorney General were set aside and the aliens granted relief (*United States ex rel Chin Ping Zee* v. *Shaugnessy,* 107 F. Supp. 607; *United States ex rel Watts* v. *Shaughnessy* 107 F. Supp. 613; *Sang Hyup Park* v. *Barber.* 107 F. Supp. 603 id. 605). If the decision of the Court below is permitted to stand it seems inevitable that the other cases will be reversed (The government has filed appeals in the other cases).

Jurisdiction

The order of the Court of Appeals for the Second Circuit was made and entered on the 5th day of December, 1952. The jurisdiction of this Court invoked under Section 1254 (1) of Title 28, U. S. C. and Section 5 (b) of Rule 38 of the Revised Rules of this Court, as amended.

Questions Presented

The questions arising herein have resulted in wide Judicial divergence. There is a dissenting opinion in the case at hand and three District Judges have followed a line different from the prevailing opinion.

The questions here are as follows:

(1) Was the procedure, followed by the Immigration Service, in determining the question of physical persecution, in accordance with the Constitution as regards the due process which is to be accorded an alien? Specifically speaking, was the petitioner denied a proper hearing? Were his rights to appeal, in accordance with Law, denied? Could the Commissioner make a decision after the "hear-

ing" without findings of fact and conclusions of law to support the decision? And was the "finding" of the Commissioner based upon substantial evidence?

(2) In a case such as this, where the Government fails to present any evidence, and the only evidence adduced is that of the petitioner, where there is no administrative hearing in accordance with Law, where there are no findings of fact and conclusions of law, where there is no expression of the evidence upon which the decision was reached, and where the decision is negative in form, is a decision of the Commissioner under such circumstances capricious and arbitrary?

The Courts below have answered all these questions contrary to the contentions of the petitioner, the dissenting opinion of Justice Clark and several District Judges.

Reasons Why Certiorari Should Be Granted

The fates of many men will be determined by the outcome of this case. There are cases which may be outwardly more appealing to those who sit in judgment, such as the case of those Chinese who were at all times opposed to the Communist Chinese regime (*United States ex rel. Chen Ping Zee* v. *Shaughnessy, supra*) or the case of the anti-Franco Spaniard (*United States ex rel. Watts* v. *Shaughnessy, supra*) or the case of the anti-Rhee Korean (*Sang Hyup Park* v. *Barber, supra*). Again, it may be the Pole whose burning hatred for Communism is so great that his return to Poland can only result in bodily, physical harm. It may also be the Yugoslav (two of whom, in addition to young Dolenz, the attorneys here are now representing in other cases) whose deportation to the country of his birth means liquidation.

We are constrained to make this point only because we must face the reality of the deepseated hatred which even learned men have to anything which has been tainted by Communism. Petitioner here was a Communist from the age of 16 to the age of 20 and must face the actuality that this imponderable may have prejudiced his rights in the Courts below. We said in the Court below that the cry of "Communism" today makes brave men less brave.

A reading of the investigator's report to the Commissioner, as well as the statement of facts contained in the prevailing opinion below gives the distinct impression of an innate desire of those responsible for these expressions to tar the petitioner with the brush of "Communism".

Those who drafted these papers abhor Communism. Yet, we maintain that the Courts below have perpetrated a grave injustice in sustaining the directive of the Immagration Service in this case. The grave danger of this decision is sharpened when viewed in the perspective of all the other similar cases where the aliens are not and never were Communists. Thus viewed, the rule that due process is to be afforded to all, regardless of our prejudices, is demonstrated.

Petitioner knows that a review of his case before this tribunal will be just, detached, objective and humane and removed from the stresses of today, which unfortunately mar the reason of men of rectitude. We respectfully submit that the foregoing circumstances alone are worthy of this Court's consideration in determining if certiorari should be granted.

That the fear of physical persecution is something real, something that causes these aliens to resist return to the countries of their origin, even at the cost of their lives, is graphically illustrated by the cases of 22 year old Sweta Kojic, also known as Lewkovich (Administra-

tion file #0302-3873), and Luka Sarich (Administrative file #0300-308269), both of whom were represented by the petitioner's present attorneys. Both were ordered deported to Yugoslavia. Kojic slashed his wrists on the eve of his departure. Sarich went on a hunger strike. Negotiations with the Canadian and Italian authorities resulted in Kojic being accepted by Canada and Sarich by Italy. Both gratefully departed.

That all the aliens whose lives are in jeopardy in these cases are little men (in the sense that they are not diplomats or figures of note) does not mean that they do not suffer at the hands of any form of totalitarianism when they reject such ideologies. The peasant who openly decries the yoke of Communism in his village suffers physical persecution as much as the Catholic prelate who openly and articulately attacks Communism and thus gains a world wide audience. The one difference is that the world observes the tortures of the prelate and the peasant conveniently disappears. Within the purport of this law, there is and should not be any question of degree of the statute of the person affected. There is but one question,—Will he be physically persecuted?

We submit that where the law provides for a means of saving aliens from physical persecution as a result of deportation, the Attorney General wherever possible should find that such relief is warranted. We say that petitioner's case is one of those cases.

We further submit that there is not one case known to us in which the Attorney General has favorably found for an alien in one of these so-called "physical persecution" cases. In the absence of a favorable finding, we submit it may be inferred that the Attorney General studiously disregards due process in the interest of establishing policy. The lack of any evidence of deliberation in his decision supports this belief.

The same formula has been followed in each case. In each case there has been the usual negative recital. In each case there have been no findings of fact or conclusions of law. In each case, appeals to the Board of Immagration Appeals have been denied.

Circuit Judge Clark, in dissenting, said in this case:

> "The requirement of a definite finding for certain action implies deliberation and quasi-judicial adjudication, rather than mere refusal to think or act; rationally it suggests that contrary action should be based on a contrary finding. This logical conclusion is here strengthened by the obvious Congressional intent to ameliorate the potentially tragic consequences which may attend deportation to certain countries. The construction claimed by the government makes a cruel hoax of the announced relief. The Attorney-General or his representatives may sit back and do nothing; they need not give even the consideration necessary to say, "We are not convinced"—and the statutory provision becomes nugatory."

He went on to review the proofs in this case and called them "persuasive". He had this to say:

> "I suggest that reading this record—containing nothing to challenge the alien's contention—hardly any of us would doubt the fate awaiting this renegade Communist if returned to the Communist country where he had joined the part as a boy."

Circuit Judge Clark is not alone. As he pointed out in his opinion, several District Judges are in agreement with him. He refers to the *Zee, Watts* and *Parks* cases cited above.

The Board of Immigration Appeals has had the following to say about these cases:

> "The regulations are silent as to the procedure by which this issue is to be adjudicated, probably because in the great majority of cases the question never arises. Because of expedience, at the initial hearing no provision is made in the regulations for raising or litigating this issue. As a matter of practicability, this may be an advisable procedure. However, expediency cannot deny to an alien a right which the statute gives him. If the Enforcement officers in this case eventually should select Greece as the country to which the alien is to be deported (after it has established that his deportation to Poland cannot be effected because that country will not accept him into its territory), then and at that time the alien has a right, if he so elects, to file an exception to the warrant directing deportation to Greece, and has a right to be heard on the issue of whether if deported to that country he would be subjected to physical persecution. Such hearing must be conducted with all safeguards attending an administrative hearing in a deportation proceeding. An appeal eventually lies to this Board on this issue" (Administrative File #7476356).

And finally we urge as a reason why certiorari should be granted the anomaly which is created between the existing decision in this case (the result of what we believe to be policy making by the Immigration Service) and the policy of the State Department in dealing with prisoners of war in the Korean struggle. If the law, 8 U. S. C. 156, subd. (a) were nonexistent, the claim of asylum, which is the basis of this law, might be highly questionable. But where Congress has evidenced its desire to return to a principle

which in the earlier years of our Republic graced our country by its enlightened acceptance to its bosom of aliens fleeing from persecution, our judiciary should not permit that principle to be debauched as it has been in the instant case.

WHEREFORE, it is respectfully submitted that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

New York City, December 31, 1952.

Respectfully submitted,

FEINGOLD & FALUSSY,

By ALOYSIUS C. FALUSSY,
Counsel for Petitioner.

Supreme Court of the United States

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No.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

By the rules, a stay of deportation is granted provided the petition for certiarari be made within thirty days of the filing of the opinion of the Court of Appeals.

Thus pressed for time, in the course of setting forth our legal arguments, we will mention facts not recited in our petition but which, nevertheless, are part of the record below. This will be done in order to sustain the continuity of our reasoning.

The assignment of errors appear from the headnotes and sub-headnotes of our points.

POINT I

The courts below erred in holding that the Immigration Service in determining the question of physical persecution accorded petitioner due process.

An alien within the United States who did not enter the country clandestinely is entitled to due process in a deportation proceeding (*Wong Yung Sung* v. *McGrath,* 339 U. S. 33, 49; Japanese Immigrant Case, 189 U. S. 86, 104; *United States ex rel Mezei* v. *Shaughnessy,* 195 F. (2d) 964, 967).

Dolenz entered legally on October 21, 1949 and has been here since (from February 28, 1951 on Ellis Island). Therefore, under the doctrine of the *Sung* case, he is entitled to the safeguards of procedural due process.

Petitioner contends that he was denied due process as to the manner in which the question of physical persecution was determined for the reasons which follow.

(A)

Relator was denied a proper administrative hearing and the right to an administrative appeal.

An investigator conducted the "hearing" in this case. His report evidences his bias. He made no findings of fact or conclusions of law such as an examiner would have made. He had neither the independence nor tenure granted by the Administrative Procedure Act "as to give the assurances of neutrality which Congress thought would guarantee impartiality of the administrative process" (*Wong Yung Sung* v. *McGrath, supra*).

The investigator was both prosecutor and judge.

We submit that the petitioner was entitled to a hearing before a hearing officer who would have impartially

tried the question of physical persecution. We further submit that if such officer's decision had been unfavorable, petitioner had open to him the administrative appeals which were denied him in the instant case.

The prevailing opinion in the Court below took the position that inasmuch as Congress passed 8 U. S. C. 155 (a), compliance with the *Wong Yung Sung* decision no longer was required by the Immigration Service, as to sections 1004, 1006 and 1007 of the Administrative Procedure Act, 5 U. S. C. 1001 et seq. It was further said that in this phase of deportation Congress had not prescribed "any procedure to be followed by the Attorney General in performing this duty" and that therefore judicial review is "limited to whether the procedure was essentially fair."

We reject the reasoning of the prevailing opinion for a number of reasons. If our main thesis is wrong, we submit that the minimum due process required in this case was that which the court below accepted as its guide—the conduct of deportation proceedings in conformance with due process, less compliance with the excepted sections of the Administrative Procedure Act.

Due process even in accordance with this construction would require adherence to the usual practices and procedures promulgated in 8 C. F. R. 151 et seq., and not a departure therefrom, as indicated by the said opinion below. As the Board of Immigration Appeals has said he "has a right to be heard on the issue of whether, if deported to that country, he would be subjected to physical persecution. Such hearing must be conducted with all safeguards, attending an administrative hearing in a deportation proceeding. An appeal eventually lies to this board in this issue" (Administrative Case #7476356—decided March 13, 1952).

The court below failed to distinguish between an administrative hearing in a deportation proceeding and an administrative proceeding in accordance with the Administrative Procedure Act. We reiterate—petitioner was entitled to at least a deportation hearing. It would seem that the Court below stretched its point too far when it offered the failure of Congress to provide a specific procedure for this type of case as a ground for holding that petitioner was not entitled to any hearing at all.

Much is to be said for the contention of the petitioner below that he was entitled to a hearing with all the safeguards of the Administrative Procedure Act. Though sections 1004, 1006 and 1007 of the Administrative Procedure Act were excepted from deportation proceedings, section 1009 remained inviolate. Thus, a court could hold unlawful a decision of the Immigration Service which was arbitrary and capricious, contrary to constitutional right, in excess of statutory jurisdiction, without observance of procedure required by law, unsupported by substantial evidence or unwarranted by the facts (*Compare Price* v. *Commissioner of Immigration and Naturalization,* 6th Circuit, 185 F. (2d) 578, followed in *Birns* v. *Commissioner of Immigration and Naturalization* 103 F. Supp. 180 and *Barber* v. *Yanish* 196 F. (2d) 53. See also *McGrath* v. *Kristensen,* 340 U. S. 162, 169).

Petitioner was entitled to be heard before the tribunals created by law for the disposition of deportation matters. He was denied due process when the Attorney General unlawfully created his own devices to accomplish his policy of denial of asylum to those who face physical persecution through deportation.

(B)

Assuming arguendo that the so-called hearing was proper, the failure of the Commissioner to support his decision by proper findings of fact and conclusions of law was a denial of due process.

The law, 8 U. S. C. 156, subd. (a) required that the Attorney General "shall find" concerning the question of persecution. These words have been invested with a special legal significance in administrative law cases in all our Federal Courts. This court has recently enumerated what it calls "a simple but fundamental rule of administrative law" that "orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."

> *Sec.* v. *Chenery,* 318 U. S. 80, Sup. Ct. 454, 462 (1943).

Congress has also put its stamp of approval on the requirement that the administrative officer adequately reveal the basis of his actions. Section 8-B of the Administrative Procedure Act provides:

> "The records shall show the ruling upon each such finding, conclusion or exception presented. All decisions (including initial, recommended or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor upon all the material, issues of fact, law or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof" (5 U. S. C. 1007).

When we match what was done in this case against the above minimum standard of fairness laid down by this Court and Congress, the inadequacy of the Government's action is thrown into sharp relief.

The "finding" required by the statute is sought to be satisfied by a one line order signed by Argyle R. Mackay, Commissioner of Immigration, that:

> "Pursuant to the requirements of Section 20 of the Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, Public Law 831, 81st Congress, after review of the facts in this case, I do not find that if this alien is deported to Yugoslavia he would be subject to physical persecution."

The inadequacy of the Commissioner's report is pointed up by a consideration of a distinction recognized many times by this court, between "ultimate" facts and "basic" facts. The findings which statutes usually require are findings of ultimate fact, such as the requirement here that the Attorney General find that an alien would or would not be physically persecuted if deported to Country X. In all common sense and fairness, there must also be a finding of the basic facts relied on to support such an assertion.

This court's language in *U. S.* v. *Pierce Auto Lines,* 327 U. S. at 533, 66 Supreme Court 696 is representative:

> "* * * such an ultimate finding [that an applicant for a motor carrier certificate was fit, willing and able to perform the service proposed] was not enough * * * in the absence of a basis finding to support it * * *"

In another case, this court declared:

> "We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest."
>
> *Colorado-Wyoming Gas Co.* 1. F. P. C., 342 U. S. 626, 634, 65 Sup. Ct. 850, 854 (1945);

Morgan v. *U. S.*, 298 U. S. 468, 480, 56 Sup. Ct. 906, 911 (1936).

The finding here was "carefully negative in form" and "the precise language" was "used with obvious circumspection". (See Clark, *C. J.* dissenting opinion in Appendix.) Its inadequacy should be apparent. It becomes more strikingly inadequate when one attempts to follow the obscure and crabbed language of the prevailing opinion below:

> "The Attorney General decided that no finding that the appellant would be physically persecuted should be made."

Again,

> "No particular findings were required to support the decision not to make the finding which alone would have excluded Yugoslavia from the category of countries to which the Attorney General could in his direction direct the deportation of appellant."

These Alice-in-Wonderland judicial expressions might be hilarious if the tragedy which faces the petitioner were not so real.

It would seem that where, as here, a life may be liquidated by a decision made by an administrative official of a democratic government, reasons should be ascribed for such action. Any decision lacking such reasons and any such decision patently negating deliberation is a direct attack upon the constitutional rights of the person affected by such decision. The petitioner here was so affected.